Affidavit of Morris Skolnick

I have read the affidavit of James D. Russo, sworn to on February 13, 1956, and categorically deny that there was any conference between the petitioner, Mr. Mack, and myself in the spring of 1955, the only conference having been held on December 16, 1954. I did not then or at any other time tell petitioner or Mr. Mack that Mr. Mack's lack of a Treasury card did not matter nor was the greatest part of the questions at the conference answered by Mr. Mack. Mr. Mack did not argue points of fact and law; the conference was not treated as an attempt to achieve a civil settlement. Petitioner's statement in his affidavit "nor was I ever advised by either of them [referring to me amongst others] of my rights under the law or my constitutional rights under the Fourth and Fifth Amendments to the Constitution" is completely false as is shown by the statement under the oath which has been read, signed, [100] and sworn to by the petitioner himself—a statement which was made, signed, and sworn to in the presence of his own attorney.

None of the investigation conducted by me came about as a result of any clues or leads obtained from the books and records of petitioner with the possible exception of some one or two companies involving only approximately fifty dollars.

(Sworn to by Morris Skonick, Feb. 23, 1956.)

Affidavit of Leonard P. Moore.

[86]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Kings, ss:

LEONARD P. MOORE, being duly sworn, deposes and says:

I am the United States Attorney for the Eastern District of New York and am charged with the responsibility of presenting to the Grand Jury for their consideration and action evidence of crimes against the laws of the United States.

There have been submitted to this office, for presentation to the Grand Jury, facts which indicate that James D. Russo willfully aided and assisted in the preparation of false and fraudulent tax returns to be filed by other persons for the years 1949, 1950, and 1951 in violation of Section 3793 (b) (1) of the Internal Revenue Code.

It may be necessary to call as many as twenty-three witnesses in connection with this proceeding.

[87] The statute of limitations will run on March 15, 1956, and it is imperative, because of the shortness of time, that the presentation commence immediately.

Although the motion made in this proceeding relates only to an alleged illegal search and seizure made in respect to certain books and papers, claimed to have been obtained from an accountant said to have been employed by the taxpayer Russo, these books and papers do not relate in any way to the charges against Russo under Section 3793 (b) (1) of the Internal Revenue Code. Nevertheless, the terms of the *ex parte* temporary restraining order are so broad that they might well apply to any proceeding. They state that the United States

Attorney and all Agents and representatives of the United States are "stayed from submitting any evidence or information to a Grand Jury or from taking any other or further proceedings in relation to the above captioned petitioner [Russo] pending the determination of this application and the service of notice of entry of an order thereon."

Unless the stay is immediately vacated the Government will be unable, through its duly appointed law enforcement officers, to enforce the laws of the United States against those who have violated them.

The Department of Justice has also forwarded to this office, for the institution of criminal proceedings, a case involving the willful attempted tax evasion of James D. Russo of income taxes for the years 1949, 1950, and 1951 in violation of Section 145 (b) of the Internal Revnue Code.

[88] The statute of limitations for the year 1949 will bar prosecution on March 15, 1956. This office has been requested to proceed immediately with the presentation to the Grand Jury of the facts developed by Government Agents in their investigation. Many witnesses will have to be called in order to present the facts.

Whether the particular books and papers made the subject of the taxpayer's application are necessary for the presentation to the Grand Jury need not be determined at this time. The Government is in possession of facts in no way derived from these books and papers which will show that the taxpayer willfully failed to report his correct income for the years in question. Furthermore the affidavits submitted by Government Agents Skolnick and Foley definitely establish the only two salient facts determinative of the taxpayer's present petition, namely, that the taxpayer Russo was represented by an attorney, Frank D. Paulo, and that he furnished the information necessary to check the sources of his income voluntarily.

Affidavit of Leonard P. Moore

As early as May 19, 1953, the taxpayer Russo in the presence of his attorney voluntarily disclosed his business as an insurance agent, the names of the companies he represented, and the fact that he did business with them. Thus the taxpayer's source of income from insurance commissions was disclosed by him long before any of the events referred to in the petition which he now makes to the Court.

The petitioner, Russo, is fully protected in such rights as he may have because he can always move should an indictment result in the event that he can make [89] a meritorious showing that any books and papers were improperly taken or more properly at the trial itself when the Trial Judge will have an ample opportunity, in the light of all the evidence, to decide whether petitioner's rights have in any way been invaded.

WHEREFORE, I respectfully request that the temporary restraining order be vacated forthwith so that the Government may proceed in the manner prescribed by law to present evidence to the duly constituted Federal Grand Jury in this District.

(Sworn to by Leonard P. More, Feb. 23, 1956.)

Order to Show Cause to Take Deposition of William Mack.

[101]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

On reading and filing the affidavit of Boris Kostelanetz, sworn to February 27, 1956, it is

ORDERED, that the United States Attorney for the Eastern District of New York show cause at a Stated Term for motions to be held on the 29th day of February, 1956, at the United States Court House, Washington and Johnson Streets, Brooklyn, New York, in Room 727, at 10:00 A. M. in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made, pursuant to Rule 26 of the Federal Rules of Civil Procedure, granting leave to the above entitled petitioner to take the deposition of William Mack, whose address is 36 Richmond Terrace, Staten Island, New York, prior to the expiration of 20 days after the commencement of this special proceeding and why such other and further relief as the Court may deem just and proper should not be granted; and it is further

ORDERED, that sufficient cause having been shown, let service of a copy of this order together with a copy of the affidavit upon which it is made, by delivering same personally to the United States Attorney for the Eastern District of New York, or to some person designated by him to receive service of process, on or before 5 P. M., on February 27, 1956, be deemed good and sufficient service.

Dated: New York, February 27, 1956.

/s/ LEO F. RAYFIEL
United States District Judge

Affidavit of Boris Kostelanetz, Read in Support of Foregoing Motion.

[102]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

BORIS KOSTELANETZ, being duly sworn, deposes and says:

1. I am a member of Corcoran, Kostelanetz & Gladstone, the attorneys for the above encaptioned petitioner, and have knowledge of the facts hereinafter set forth.

2. This affidavit is made in support of a motion for leave to take the deposition of William Mack, whose business address is 36 Richmond Terrace, Staten Island, New York, prior to the expiration of 20 days after the commencement of this special proceeding on the ground that said William Mack has peculiar knowledge of facts which are vital and material to the issues presented herein.

3. This application for leave to take the deposition of this witness prior to the expiration of 20 days is made so that the Court and parties may have the benefit of this testimony prior to the submission of the issues to the Court for determination and prior to any hearing which may be ordered hereon.

4. This special proceeding was commenced by the filing of an order to show cause on February 16, 1956. The order to show cause [103] was personally served upon the respondent, United States, on February 17, 1956. The Court heard argument of the motion on preliminary affidavits on February 23 and February 24, 1956.

Affidavit of Boris Kostelanetz, Read in Support of Foregoing Motion.

and additional time was granted for the submission of further affidavits and memoranda.

5. As appeared from the argument of the motion, the testimony of William Mack will be of importance since he was the person who had transactions with agents of the Internal Revenue Service over a continuous period of more than a year and a half, at only one of which transactions the petitioner was present. The essential evidence which William Mack will be able to give the Court is not obtainable by petitioner from any other source. It is petitioner's desire to take his deposition pursuant to subpoena, at which time, of course, the United States Attorney or his representative will be present to participate in the examination.

6. In order to assume a prompt and speedy determination of the issues presented by this petitioner, petitioner asks leave to take such deposition prior to the expiration of the 20-day period stated in Rule 26 of the Federal Rules of Civil Procedure.

7. An order to show cause is prayed for herein in order to bring this application on to be heard on the next motion day so that determination of the main petition be not unduly delayed.

8. No previous application has been made for the same or similar relief prayed for herein.

WHEREFORE, your deponent respectfully prays that an order be made pursuant to Rule 26 of the Federal Rules of Civil Procedure granting leave to the petitioner to take the deposition of William Mack prior to the expiration of 20 days after the commencement of this special proceeding, and for such other and further relief as the Court may deem just and proper.

(Sworn to by Boris Kostelanetz, Feb. 27, 1956.)

Affidavit of Frank D. Paulo.

[104]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Kings, ss:

FRANK D. PAULO, being duly sworn, deposes and says:

1. That he has been a Justice of the Municipal Court of the City of New York from May 18, 1954 and that prior thereto he was a practicing attorney with offices at 36 Richmond Terrace, Staten Island 1, New York.

2. That in the very first part of 1953, James D. Russo consulted me regarding a request that he had received from Morris Skolnick to appear at his office in connection with an investigation being conducted with respect to certain income tax returns which had been prepared by Mr. Russo for persons other than himself.

3. That after communicating with Mr. Skolnick by telephone as to certain adjournments of the scheduled hearing, Mr. Russo and your deponent, as his attorney, finally appeared at Mr. Skolnick's office some time in May 1953. Mr. Russo was sworn as a witness by Mr. Skolnick and certain statements were taken under oath from Mr. Russo by Mr. Skolnick in the presence of your deponent. It is your deponent's recollection that this inquiry was directed to the preparation of other people's returns by Mr. Russo.

[105] 4. That a transcript of the statement made by Mr. Russo was later executed by Mr. Russo at Mr. Skolnick's office in the presence of your deponent. A copy of the signed statement was given to Mr. Russo.

5. That after the interrogation conducted by Mr. Skolnick in his office, and on about May 20, 1953, Mr. John

Foley, a representative of the Bureau, advised your deponent that he had been instructed to audit Mr. Russo's personal returns and his books and records. That later your deponent communicated this fact to Mr. Russo and arrangements were made whereby Mr. Russo engaged William Mack as an accountant with respect to the examination being made by Mr. Foley.

6. Your deponent at no time thereafter, except for the instances that will hereinbelow be noted, did any of the work in connection with the examination of Mr. Russo's personal tax returns or books and records. Any conferences that were held with any representatives of the Bureau, with respect to the examinations, were with Mr. Mack. All work sheets prepared and other work done in connection with the examination of Mr. Russo's books and records were done by Mr. Mack in conjunction with representatives of the Bureau. At no time was your deponent present at any of these conferences, nor did your deponent at any time inspect or see any of the work sheets prepared, nor did your deponent in any way take part in any of the examinations of Mr. Russo's personal tax returns or the presentation of Mr. Russo's case in connection with said returns. The reason for suggesting to Mr. Russo that he engage an accountant when your deponent was notified by Mr. Foley of the impending examination of Mr. Russo's personal tax returns and books and records was that your deponent did not possess the requisite accounting knowledge and, therefore, did not feel qualified to handle the matter.

[106] 7. Mr. Foley from time to time would make inquiries of your deponent as to when he could examine the books and records of Mr. Russo. His requests would be referred to Mr. Mack. On two occasions Mr. Foley had spoken to your deponent about tax waivers which were forwarded to Mr. Foley from Mr. Russo through your

deponent's office. There may have been occasions when your deponent notified Mr. Mack by telephone that Mr. Foley wanted to examine certain books or wanted certain papers in connection with his examination, but so far as your deponent is concerned, Mr. Mack was in complete and entire charge of the examination.

8. That as far as any disclosures made by Mr. Mack concerning Mr. Russo's affairs, deponent had no part in such disclosures in any manner. Your deponent was not present at any disclosures, and he did not supervise them.

9. The retention of Mr. Mack by Mr. Russo did not involve Mr. Mack working under deponent's direction or supervision in any way, nor was he compensated by your deponent in any way. At the time Mr. Mack was not in any sense a part of deponent's office staff and had his own office at another address. Parenthetically, however, it may be said that for many years Mr. Mack had done deponent's personal accounting work and had done such work for other clients, but always as an accountant employed and paid directly by them. He was also employed as an accountant in certain corporations in which I acted as an officer. At no time, in any of the corporations, where Mr. Mack and your deponent were acting as officers, was, or is, your deponent a majority stockholder.

10. While it is true that your deponent was an officer of Terrace Offices Corporation, your deponent did not discuss its tax [107] matters with Mr. Mack or Mr. Foley. Any tax matters in that corporation may have been handled by Mr. Mack, and some other officer of the corporation, but not your deponent.

11. Your deponent has no recollection of any other tax matter that he, Mr. Foley and Mr. Mack worked on.

(Sworn to by Frank D. Paulo, Feb. 27, 1956.)

Supplementary Affidavit of James D. Russo.

[108]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

JAMES D. RUSSO, being duly sworn, deposes and says:

1. I am the petitioner in the above entitled proceeding and have knowledge of the facts hereinafter set forth.

2. This is a supplementary affidavit in support of the application to suppress evidence, etc.

3. I am informed that on the first argument of this application, the question arose concerning the nature of the representation provided me by Frank D. Paulo, Esq., now a Justice of the Municipal Court of the City of New York. In the last half of 1952 and in the early part of 1953, I had given some assistance to the Internal Revenue Service in connection with the correction of certain alleged errors which might have appeared in income tax returns of others, in the preparation of which I had assisted. I was then asked to appear and give testimony in that connection and I engaged the services of Judge Paulo to represent me in the event my assistance in the preparation of the returns of others might involve me in their tax matters.

4. In 1953, when it appeared that my own income tax returns were about to be examined, Judge Paulo told me that he [109] preferred that I retain someone else to handle my income tax matter.

5. At this point, Judge Paulo withdrew from active participation in my case and did nothing thereafter, as his affidavit indicates, except to refer such telephone inquiries from the Internal Revenue Service, which continued to be directed to him, to Mr. William Mack. He also had some conversations relating to waivers. As a matter of fact, Judge Paulo is not enrolled to practice before the Treasury Department. A photostatic copy of a telegram from the Internal Revenue Service stating this fact is attached hereto as "Exhibit A" and made a part hereof.

6. It is conceded in the affidavit of John Foley that after an interest was manifested in my own tax matter, the activity of Judge Paulo was restricted to telephone conversations initiated by Foley. Judge Paulo stated in his affidavit that with the possible exception of the purely ministerial act in relation to the waivers, Mr. Mack was in complete charge of my income tax matter and that all inquiries were promptly referred to Mack. It is my recollection that I never discussed waivers with Foley by telephone or otherwise.

7. From the time I retained him, William Mack was in complete charge of my income tax case and met with agents and representatives of the Internal Revenue Service on numerous occasions in connection therewith. At no time, as his affidavit indicates, was Judge Paulo ever present at any meeting in relation to my income tax case. With the exception of my appearance at 253 Broadway in the early part of 1955, I was never present at any conference in relation to my own income tax case, either.

8. The peculiar and startling role of William Mack in the entire matter of my own income tax returns gives rise to certain inescapable inferences. The agents of the

Internal Revenue Service [110] knew that Mr. Mack was not enrolled or permitted to practice before them. They also knew that he had not filed a power of attorney. The violations of statute, regulation and practice requirements were manifest. As it now appears, they procured Mr. Mack to prepare various documents, records, work sheets, analyses and even a statement of net worth and cost of living. Mr. Mack diligently performed these "errands" for the agents on more than one occasion. Having recognized the general incompetence and legal disqualification of Mr. Mack, they seized upon him as a rare source and conduit of information. In a statement under oath procured by the agents of the Internal Revenue Service themselves, Mr. Mack described how he performed these services for the agents and enumerates papers he prepared for them. Mr. Mack then swears that at no time did I inspect the papers prepared by him.

9. In July 1954, when I received the letter from the District Director of Internal Revenue, bearing numerous indications that the examination then being conducted was directed toward a civil settlement, Mr. Mack had already been engaged in his activities with agents of the Internal Revenue Service for a period of about one year and had already had, as he told me, numerous meetings with the agents, having as a subject of his discussion with them the civil settlement of my own tax matter.

10. From the affidavits of John Foley, sworn to February 21, 1956, and Morris Skolnick, sworn to February 23, 1956, submitted in opposition to this proceeding, it appears conclusively that my entire tax matter was truly a joint investigation from the middle of 1952. In fact, the date Mr. Skolnick, the Special Agent, gives for his assignment, the exact nature of which is not divulged, is vaguely fixed as the early part of 1952, while the Revenue

Agent states that the date of his [111] assignment was in September 1952. It thus conclusively appears without the possibility of contradiction that despite attempts to give their investigation of my tax returns an innocuous appearance, Mr. Skolnick was at all times engaged in performing his duty of preparing and collecting evidence to support a criminal charge against me.

11. It is interesting to note, that although I appeared before Mr. Skolnick in connection with the tax returns of others in May 1953, Mr. Skolnick had made no alleged contact with any insurance company concerning my income until August 1953, almost a year after it is conceded that a Special Agent and a Revenue Agent were in the case and months after William Mack undertook to represent me. Thus, it appears that no move was made in connection with the circularization of possible sources of my income until after Mack had embarked on his course of providing information in response to every whim and demand of the Special Agent acting through the Revenue Agent.

12. The present claim of Skolnick that his investigation was based on disclosures made by me prior to Mack's entry into the case is patently insubstantial. I reaffirm it as my recollection that my first conversation with Skolnick took place in the County Clerk's office and library in Staten Island and that our conversation related solely and exclusively to the tax returns of others, in the preparation of which I had assisted. It is further my recollection that there was no conversation whatsoever relating to my own income tax. The interrogation of me in Mr. Skolnick's office in May 1953 related only in the most passing and introductory way to my own personal matters and out of a total stenographic transcript of 22 pages, it may be said that only 2 pages

might be construed as referring to my personal matter. The examination substantially and in its essence was directed to the matter of my preparation of the income tax returns of others.

[113] 13. Certain broad issues of fact are created by the affidavits in this proceeding but it cannot be denied that the basic allegations in this petition are substantiated by the affidavits submitted in opposition thereto. It is quite clear that Foley and later Ginnane were Revenue Agents working under the direction and control of Special Agent Skolnick who was involved in the case from the very outset and who was directing his efforts to obtaining evidence to support a criminal charge against me. It is clear that while well aware of the illegality of Mack's representation of me, the agents joined in these acts. It is also to be seen that the true nature of their activities was cloaked with the appearance of a routine audit.

WHEREFORE, your deponent respectfully prays that an order be made suppressing evidence, etc. as prayed for in the petition herein, or in the alternative, directing that a hearing be held to determine the issues of fact.

(Sworn to by James D. Russo, Feb. 28, 1956.)

Exhibit A, Annexed to Foregoing Affidavit of James D. Russo.

[113]

WESTERN UNION

TELEGRAM

1956 Feb 23 P M 5 0

WU 083 30 1 Extra Collect = WUX Washington DC 23 423 PME = Corcoran Kostelanetz and Gladstone = 52 Wall St New York NY =

RE YOUR TEL RECORDS OF THIS OFFICE DO NOT SHOW THAT FRANK D PAULO STATEN ISLAND N Y HAS EVER BEEN ENROLLED TO PRACTICE BEFORE THE TREASURY DEPARTMENT =
GEORGE C LEA DIRECTOR OF PRACTICE =

Opinion by Rayfiel, J.

[M4]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Appearances:

Corcoran, Kostelanetz & Gladstone, attorneys for petitioner; by Boris Kostelanetz, Esq.

Leonard P. Moore, United States Attorney, with Kenneth C. Sternberg and Zachary Fromberg, Assistant United States Attorneys, in opposition.

RAYFIEL, J.:

The petitioner has made two motions. In the first, brought under Rule 41(e) of the Federal Rules of Criminal Procedure, he seeks an order (1) declaring unreasonable, illegal and void the search and seizure made herein, (2) directing the return of his books, records, etc., in the possession of the Government agents, (3) suppressing all such books, memoranda and documents, etc., and (4) directing that a hearing be held and evidence be adduced respecting the issues raised by the motion. In the second, made while the first was under consideration, the petitioner asks, pursuant to Rule 26 of the Federal Rules of Civil Procedure, for an order granting leave to take the deposition of one William Mack.

[115] Since the argument of said motions the petitioner has been indicated, charged with violations of Sections 145(b) and 3793 (b) (1) of Title 26 of the United States Code.

From the papers submitted the following appear to be the facts: the petitioner is an assistant clerk in the office of the Clerk of the County of Richmond. In addi-

tion, he conducted an insurance brokerage business and prepared income tax returns for other persons. On June 23, 1952, one Morris Skolnick, a Special Agent of the Internal Revenue Service, who has been assigned to the investigation of a number of tax returns prepared by the petitioner for others, telephoned him, requesting that he come to the office of the Intelligence Unit of the Internal Revenue Service, at 253 Broadway, New York City. He informed Skolnick that it would be inconvenient for him to leave his place of employment, and accordingly Skolnick made arrangements to meet him at the County Clerk's Office in Richmond. On June 26, 1952, Skolnick and the petitioner conferred in the library of the County Court House in Richmond County. It was then that the petitioner told Skolnick that in addition to his employment in the Richmond County Clerk's Office he conducted an insurance brokerage business and prepared income tax returns for other persons. The petitioner promised to give Skolnick a list of the persons for whom he had prepared tax returns. He described his insurance business generally, giving the Agent the names of some of the companies with which he had done business. On July 3, 1952, petitioner [146] telephoned Skolnick, informing him that the list was almost completed, and that he wished to submit it in person. On July 8, 1952, petitioner called at Skolnick's office and gave him a list containing seventy-five names (presumably of persons whose tax returns he had prepared). He also supplied the names of two banks in which he had checking accounts. On February 10, 1953, one Frank D. Paulo, Esq., an attorney, telephoned Skolnick, and advised him that he had been retained to represent the petitioner. Later, on May 6, 1953, the petitioner called Skolnick, told him that he had retained Mr. Paulo to represent him, and suggested that Skolnick communicate with the attorney respecting a possible appoint-

ment for a conference. An appointment was arranged for May 19, 1953, at which time the petitioner appeared at the offices of the Intelligence Unit, at 253 Broadway, New York City, with Mr. Paulo. After the petitioner had consented to make a statement under oath, and after he had been advised that he had a right to decline to answer any questions which might tend to incriminate him, all this in the presence of his attorney, Mr. Paulo, he was interrogated by Skolnick, the questions and answers being recorded by a stenographer. A transcript of the record, some twenty-two pages in length, was prepared. It included, inter alia, a number of questions and answers relating to the petitioner's income, and the nature and extent of his business with various insurance companies during the years 1949, 1950 [117] and 1951. The petitioner gave Skolnick the names of seven insurance companies in whose behalf he had solicited business. Pursuant to an arrangement theretofore made Mr. Paulo returned to Skolnick's office on July 2, 1953, for the purpose of reading and signing the transcript of the petitioner's deposition. After both had read it the petitioner initialed each page and signed his name at the end thereof. After swearing to the truth thereof before Skolnick, a copy was given to the petitioner. In or about September, 1952, John Foley, a revenue agent, was assigned to examine the tax returns of the petitioner as well as those which he had prepared for other persons. In connection with these examinations Foley communicated with the petitioner, and was referred by him to Mr. Paulo, his attorney, who, in May, 1953, advised Foley that one William Mack, an accountant, who maintained offices in Richmond County, had been engaged by petitioner to assist him in connection with the examination of his tax returns. Mr. Mack, Mr. Paulo stated in his affidavit, had done accounting work for him and some of his clients. Subsequently Foley and Skolnick com-

municated with the petitioner and Mack in connection with their investigations. Foley obtained from Mack petitioner's books and records as well as certain work sheets which Mack had prepared. On December 16, 1954, petitioner and Mack appeared at Skolnick's office, and, although he informed the agent that he would not answer any [118] questions under oath, the petitioner was again interrogated, after having been advised of his rights.

Petitioner now seeks to suppress the evidence obtained by Skolnick and Foley on the ground that it was fraudulently and illegally obtained. He grounds his application chiefly, if not entirely, on the fact that Mack, the accountant designated by petitioner, and his then counsel, Mr. Paulo, were not admitted to practice before the United States Treasury Department, hence, were not qualified to represent him in the investigation then being conducted, and, therefore, that all of the proceedings had therein were tainted with illegality. That contention is impertinent to the issues herein and entirely without merit.

The petitioner cites the case of *U. S. v. Lipschitz*, 117 F. Supp. 466, in support of his motion to suppress. That case is clearly distinguishable from the instant case. In the *Lipschitz* case the *special agent*, during his investigation of the matter in preparation for criminal prosecution, directed the *revenue agent* to visit the offices of the taxpayer and obtain, without his consent or knowledge, information and excerpts from his books and records. In the instant case the special agent *himself* interviewed the petitioner and informed him as to his constitutional rights, one such interview being had in the presence of his counsel (Mr. Paulo), who thereafter returned with petitioner, who read the transcript thereof, [119] and then signed it in the presence of his counsel.

The case at bar almost parallels the case of *Turner v. U. S.*, 212 F. 2nd, 926, wherein the Court said, at page

931: "The relevant inquiry is always whether the taxpayer freely gives his consent, and as to that there is no dispute in this instance."

It has been expressly held time and again in tax evasion and other criminal cases that it is not essential to the admissibility of statements secured by officers of the law from a defendant that he should be first warned that the information might be used against him in a criminal case, *provided that it was voluntarily and understandingly given. United States v. Burdick*; 3 Cir. 214 F. 2d 768, 773; *Montgomery v. United States*, 5 Cir., 203 F. 2d 887, 892; *Lisansky v. United States*, 4 Cir., 31 F. 2d 846, 851, 67 A. L. R. 67; *Hanson v. United States*, 8 Cir., 186 F. 2d 61, 64; *Powers v. United States*, 223 U. S. 303, 32 S. Ct. 281, 56 L. Ed. 448; *Wilson v. United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090." (Italics added).

It is my opinion that the petitioner freely and voluntarily gave the information in question to Skolnick and Foley. He was represented by counsel at the time that many of the voluntary disclosures were made, a number of them before Mack came into the case. I am satisfied also that the information supplied by Mack was given with the consent, if not by the direction of the petitioner. His claim that, since [120] Mack was not admitted to practice before the Treasury Department, he did not have the authority to appear and act in his behalf, is, in my opinion, merely an expedient.

Accordingly, the first motion is in all respects denied.

As to the second motion, I find no sanction for it under the Rules. The motion to suppress was a miscellaneous proceeding, being neither civil nor criminal. Since the argument of the motion the petitioner has been indicted, and the matter is now a criminal proceeding. Inasmuch as provision is made in the Federal Rules of

Opinion by Rayfiel, J.

Criminal Procedure for the taking of depositions, Rule 26 of the Federal Rules of Civil Procedure, under which the second motion was made, is inapplicable. Nor does the examination of Mack, sought under said motion, appear to be authorized by Rule 15 of said criminal rules, which provides for the taking of depositions. There is no proof, or even indication, that Mack is a prospective witness; nor has it been established "that it is necessary to take his deposition in order to prevent a failure of justice."

The second motion is therefore denied.

Dated: June 27th, 1956.

(Sgd.) LEO F. RAYFIEL
United States District Judge

Notice of Appeal.

[121]

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

NOTICE is hereby given that James D. Russo, the petitioner above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Honorable Leo F. Rayfiel, United States District Judge for the Eastern District of New York, dated June 27, 1956.

A. Denying petitioner's motion brought under Rule 41(e) of the Federal Rules of Criminal Procedure for an order

1. Declaring unreasonable, illegal and void the search and seizure made herein;

2. Directing the return of all books, papers, records, memoranda, extracts, notes and copies therefrom, other documents and all other property belonging to the above captioned petitioner taken by agents and representatives of the United States Government and now in the possession of the United States Attorney or other agents or representatives of the United States of America;

3. Directing that any and all of the aforesaid documents, books, papers, memoranda and all other property belonging to the above captioned petitioner be [122] suppressed and that the United States Attorney and all other agents of the Government be restrained and precluded from using any of said books, papers, records, memoranda, other documents and all other property belonging to the above captioned petitioner, or any information directly or indirectly obtained therefrom or by means thereof or as a result of examination and use thereof

and leads and clues revealed thereby and that all information disclosed to the Government or to its agents by the petitioner above captioned, or directly or indirectly obtained by the Government through or as a result of or derived from the use of such information, and all leads, clues and other evidence directly or indirectly obtained by or through or derived from or revealed by such information be suppressed and that the United States Attorney and all other agents or representatives of the United States Government be restrained from submitting same to a Grand Jury, from using same on any trial or for any other reason;

4. Directing that a hearing be held and that evidence may be adduced for the determination of issues of fact arising out of this motion; and

B. Denying petitioner's motion brought pursuant to Rule 26 of the Federal Rules of Civil Procedure, for an order granting leave to take the deposition of one William Mack, entered in this action on June 27, 1956.

Dated: July 5, 1956.

CORCORAN, KOSTELANETZ & GLADSTONE
By BORIS KOSTELANETZ
A Member of the Firm
Attorneys for Petitioner
Office and P. O. Address
52 Wall Street
Borough of Manhattan
New York 5, N. Y.

To:

Honorable Leonard P. Moore
United States Attorney,
Eastern District of New York
United States Court House
Brooklyn, New York